(3)

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES, an Illinois Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

JOHN BAUMGARTNER
Counsel of Record
CHURCHILL, BAUMGARTNER & QUINN
P.O. Box 284
Grayslake, Illinois 60030
(847) 223-1500

PAUL KALINICH
KALINICH AND McCLUSKEY
800 Roosevelt Road
Bldg. A, Ste. 106
Glen Ellyn, Illinois 60137
(630) 469-8930

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

8 pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT:	
I.	
THE ISSUES PRESENTED BY THIS CASE REQUIRE CLARIFICATION BY THIS COURT ...	1
II.	
THIS CASE PROPERLY PRESENTS THOSE ISSUES IN A FORM APPROPRIATE FOR CONSIDERATION BY THIS COURT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	PAGE
Albrecht v. Herald Company, 390 U.S. 145, 88 S.Ct. 869 (1968)	1
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884 (1990)	3, 4, 5
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)	3, 4, 5
Cargill v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427	4

PETITIONER'S REPLY BRIEF

There are only two questions presented by State Oil's Petition and Khan's Response. Does this case present issues which should be considered by this Court, and does this case properly present those issues?

I.

THE ISSUES PRESENTED BY THIS CASE REQUIRE CLARIFICATION BY THIS COURT

As set forth in the Petition filed in this cause, significant questions remain concerning the decision in *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869 (1968). These are questions about the applicability of *per se* liability to vertical price fixing, either maximum or minimum, and questions about the application of standards for "antitrust damages," as defined since *Albrecht*, to maximum price fixing cases.

Respondent states that there are no conflicting decisions by the lower courts. The lower court in this case stated that it agreed with the decision of the trial court, that the injuries claimed by Plaintiff did not fit within the definition of "antitrust injury." That court felt, however, that until this Court took some action clarifying *Albrecht*, it was obligated to reverse. The lack of conflicting decisions results solely from the fact that the lower courts are looking to this Court for guidance, and are reluctant to appear to be overruling Supreme Court decisions.

The questions presented are not merely theoretical, of interest only to scholars. These questions affect the relationship between every single supplier and dealer in the

United States. The existing interpretations reduce the potential for the use of price reduction to enhance competition between suppliers and between brands. Suppliers are entitled to reduce the price which they charge to dealers, but they may not force the dealer to pass that reduction on to the public. The potential for this type of restriction to either reduce or enhance competition at the consumer level is a question which may affect the prices paid by every person in this country. Economic and legal analysis suggest that a *per se* inquiry must be based on something more than categorizations.

II.

THIS CASE PROPERLY PRESENTS THOSE ISSUES IN A FORM APPROPRIATE FOR CONSIDERATION BY THIS COURT

Respondent also contends that this case is not an appropriate vehicle for consideration of these questions, because it was decided on a motion for summary judgment. His argument that something different may result upon a trial of the cause which will either eliminate the need for further action in the case or clarify the questions presented is subject to three concerns.

First, any alteration of the case will occur only if the trial court does not follow the mandate of the Court of Appeals. If the mandate of the Court of Appeals is followed, the same questions will exist at the end of the trial as exist at this time. Second, those questions may then have been settled by the fact that the decision of the Court of Appeals will have become the law of the case. Third, the mere fact that there is some possibility that this particular case may go away is not a reason not

to resolve questions which seriously affect the manner in which goods are merchandised. That possibility always exists when a trial court ruling has been reversed.

This case clearly presents the question of vertical maximum price fixing. The case involves only two parties, one supplier and one dealer. There is no question of any involvement by any other party.

This case clearly presents the question of antitrust damages. Respondent's sole evidence of injury is that presented by its expert. The expert claimed that a party who operated the station a year later earned a higher profit margin than that permitted to Respondent. The expert assumed that Respondent would, therefore, have been able to earn that same margin, had Respondent not been constrained by his contract with Petitioner. There is no reference to competition, either in terms of its effect on Respondent's ability to raise prices, or in terms of Respondent's effect on competitors. There is no contention of a reduction in Respondent's ability to provide services, and no claim of any attempt to benefit any other dealer. The sole damage claim is that Respondent was in a position to earn more money by raising prices to the consumer, and Petitioner prevented him from doing so. The court below did not decide that a gasoline dealer *could* demonstrate that he had suffered an injury from price constraints; it decided that it was obligated to hold that the injury claimed by this dealer was an "antitrust injury".

The questions presented in this case were not settled in either *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) or *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884 (1990).

In *Business Electronics*, this Court removed from the *per se* category vertical restraints which do not include some agreement on prices. There is no statement that vertical restraints which do include some agreement on prices would necessarily remain in the *per se* category. In fact, the concept of analysis by category was severely criticized.

Atlantic Richfield did not hold that dealers, such as Respondent, suffered antitrust injury when the ability of the dealer to freely set prices was constrained by a scheme of vertical maximum resale price maintenance. If that were correct, and Respondent could establish that it suffered any causally related injury, then the injury which he suffered would be antitrust injury. *Atlantic Richfield* was filed by a competitor, and this Court decided that the injury asserted by a competitor did not resemble any of the potential dangers described in *Albrecht*. This Court merely distinguished *Albrecht*, stating merely that it assumed *arguendo*, that *Albrecht* had been correctly decided. Citing *Cargill v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427, this Court went on to state that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anti-competitive aspect of the practice under scrutiny.

Petitioner is not requesting that this Court restrict "antitrust damages." Petitioner is requesting this Court to consider the possibility that rigid adherence to an earlier decision is in conflict with the principles expressed by this Court in subsequent decisions.

Neither the holding in *Business Electronics* nor the holding in *Atlantic Richfield* considered these issues in a direct sense. In each case, the rationale presented would, if applied to this case, require a reversal of the decision of the lower court. The issues presented in this case are significant. They can be clarified only by a decision by this Court. Those questions are clearly presented by the case in its present status.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN BAUMGARTNER
Counsel of Record
CHURCHILL, BAUMGARTNER
& QUINN
P.O. Box 284
Grayslake, Illinois 60030
(847) 223-1500

PAUL KALINICH
KALINICH AND McCLUSKEY
800 Roosevelt Road
Bldg. A, Ste. 106
Glen Ellyn, Illinois 60137
(630) 469-8930

Attorneys for Petitioner